

COMMITTEE OF BAR EXAMINERS OPEN SESSION AGENDA ITEM

AGENDA ITEM: **March 2015 – O-200**

DATE: March 16, 2015

TO: Committee of Bar Examiners

FROM: Gayle Murphy, Senior Director, Admissions
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SUBJECT: **SCOPE OF THE CALIFORNIA BAR EXAMINATION**

BACKGROUND:

Since shortly after the establishment of the Board of Bar Examiners by the California Supreme Court in 1919, an examination has been administered to applicants seeking a license to practice law in this state. The California Board of Bar Examiners became the Committee of Bar Examiners (Committee) upon the establishment of the State Bar of California in 1927. The Committee acts as an administrative arm of the California Supreme Court in administering the requirements to practice law and in certifying persons for admission to the Court.

The primary reasons for having a bar examination are for public protection, to assess the knowledge and abilities of those seeking admission to the practice of law, and to have an objective measure as to whether those seeking admission have acquired through their legal studies the minimum competence expected of those entering the profession. As part of its ongoing responsibilities, the Committee, on a continual basis, reviews the scope, format and grading of the bar examination to ensure that it remains valid, reliable and fair.

The California Bar Examination (CBX) has evolved over time – in its length, its format and in the scope of the subjects tested. Prior to 2002, the scope of subjects tested on the essay questions had been unchanged for many years and included: Civil Procedure, Community Property, Constitutional Law, Contracts, Corporations, Criminal Law and Procedure, Evidence, Professional Responsibility, Real Property, Remedies, Torts, Trusts, and Wills and Succession. Over the years, there have been several proposals to change the scope of the CBX, both to add and to delete subjects.

In September 1995, the Committee approved a proposal to explore the possibility of reducing the number of subjects tested on the CBX, specifically by eliminating Corporations, Trusts, and Wills and Succession. At its January 1997 meeting, after receiving comments from several different constituencies, the Committee decided not to reduce the number of subjects tested on the CBX.

In September 2000, the Committee considered whether the scope of the examination should be modified to: 1) expand Corporations to include partnerships, including limited liability partnerships, and to rename the subject “Business Associations”; 2) expand Contracts to include coverage of Article 3 (Negotiable Instruments) and Article 9 (Secured Transactions) of the Uniform Commercial Code (UCC); 3) make explicit that the California Evidence Code is included in the scope of Evidence, since the practice for several years prior had been to test solely on the Federal Rules of Evidence; 4) make explicit that the California Code of Civil Procedure was included in the scope of Civil Procedure, since the practice for several years prior had been to test solely on the Federal Rules of Civil Procedure; and, 5) expand and rename Community Property to Family Law, which would include issues involving marriage, unmarried cohabitants, adoption and interjurisdictional conflict of laws.

Following discussions at several of its meetings, the Committee circulated the proposed changes to the legal education community and others for comment in 2000 and 2001. The input sought included that of the Law School Assembly and the Law School Council. The Law School Assembly is composed of the deans of all law schools in California. The Law School Council consists of representatives of the various types of law schools in California, i.e., American Bar Association (ABA) approved (private and public), Committee accredited, unaccredited and correspondence law schools. There was considerable opposition expressed by the law school deans to the proposed changes to the scope of the CBX.

After consideration of the written and oral comments received, the Committee decided at its June 2001 meeting to approve in principle, subject to final confirmation of the action at a future meeting, the proposals to change “Corporations” to “Business Associations”; change “Community Property” to “Family Law”; expressly include California rules of practice and procedure in “Civil Procedure”; and expressly include California rules of evidence in “Evidence.” Subsequent to that meeting and after receiving additional input from several law school Deans, the Committee decided that it would defer consideration of the Family Law proposal pending additional review of the proposed change, but that the proposals to broaden and rename Corporations to Business Associations and to include the California rules of civil procedure and evidence in the scope of Civil Procedure and Evidence, respectively, should be adopted..

The changes, which were discussed with the Board of Trustees (known as the Board of Governors at the time), were announced in October 2002, and became effective with the July 2007 administration of the CBX. Those changes were:

- The subject titled “Corporations” was renamed “Business Associations” and the scope of the topics tested in Business Associations would include those topics already being tested in Corporations, partnerships of all forms, limited liability entities, related agency principles and uniform acts;
- The scope of the subject titled “Civil Procedure” would include the California Code of Civil Procedure; and,

- The scope of the subject titled “Evidence” would include the California Code of Evidence.

The scope of the California Bar Examination currently consists of the following subjects:

1. Business Associations
2. Civil Procedure
3. Community Property
4. Constitutional Law
5. Contracts
6. Criminal Law and Procedure
7. Evidence
8. Professional Responsibility
9. Real Property
10. Remedies
11. Torts
12. Trusts
13. Wills and Succession

Uniform Commercial Code

- a. All of Article 1;
- b. All of Article 2;
- c. Those provisions of Article 9 concerning Fixtures.

Business Associations

Including, but not limited to Corporations, Sole Proprietorships, Partnerships (General Partnerships, Limited Partnerships, Limited Liability Partnerships), Joint Ventures, Limited Liability Companies, and the principles of Agency inherent in business relationships.

Civil Procedure

Federal Rules of Civil Procedure and the California Code of Civil Procedure, including the differences between the Federal Rules and the California Rules, especially those California procedures of pleading and practice that have no specific counterparts in the Federal Rules.

Evidence

Federal Rules of Evidence and the California Evidence Code, including the differences between the Federal Rules and the California Evidence Code, especially where the California rules of evidence have no specific counterparts in the Federal Rules.

Professional Responsibility

California Rules of Professional Conduct, relevant sections of the California Business and Professions Code, and leading federal and state case law on the subject in addition to the ABA Model Rules of Professional Conduct and ABA Model Code of Professional Responsibility.

Wills and Succession

The following provisions of the California Probate Code and California law in the specific areas noted:

Division 2. General Provisions

Part 1. Effect of Death of Married Person on Community and Quasi-Community Property, Sections 100-103

Part 3. Contractual Arrangements Relating to Rights at Death, Sections 140-147, 150

Part 5. Simultaneous Death, Sections 220, 222-224

Part 6. Distribution Among Heirs or Beneficiaries, Section 240

Division 6. Wills and Intestate Succession

Part 1. Wills

Chapter 1. General Provisions, Sections 6100, 6101, 6104, 6105

Chapter 2. Execution of Wills, Sections 6110-6113

Chapter 3. Revocation and Revival, Sections 6120, 6121, 6123

Part 2. Intestate Succession, Sections 6400-6402

Part 3. Family Protection

Former Chapter 5. Spouse and Child Omitted from Will, Former Sections 6560-6562, 6570-6573 [for decedents dying prior to January 1, 1998]

Division 11. Construction of Wills, Trusts and Other Instruments

Part 1. Rules of Interpretation of Instruments, Sections 21105, 21109, 21110, 21137

Part 6. Family Protection: Omitted Spouses and Children [for decedents dying on or after January 1, 1998]

Chapter 2. Omitted Spouses, Sections 21610-21612

Chapter 3. Omitted Children, Sections 21620-21623 2

Applicants taking the CBX are advised that they may be required to answer questions involving issues from all of the subjects listed above.

Multistate Bar Examination (MBE)

The Multistate Bar Examination (MBE) is developed and graded by the National Conference of Bar Examiners (NCBE) and consists of 200 multiple-choice questions administered in one day during AM and PM sessions. The MBE tests seven subjects: Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Real Property, Torts, and Civil Procedure.

DISCUSSION:

In the past, the Committee's proposals to change the scope of the CBX have often been met with opposition from law school Deans, especially when the proposals would result in expansion of the subjects tested on the examination. In fact, many Deans have on several different occasions recommended that the Committee reduce the number of subjects tested on the CBX. The Deans generally seem to believe that the scope detrimentally affects their students' choices to take classes that would be more relevant to the areas of law in which they are intending to practice. The Deans believe that the subjects tested on CBX create a demand for courses in those particular subjects. Although, this does not appear to always be the case as many applicants, for instance, decide not to take community property in law school expecting that they will learn what they need to know in the bar review courses they take just prior to taking the CBX. Past proposals by the Committee to reduce the number of subjects tested, while advocated by many law school Deans, have been opposed by the various stakeholders in the particular subjects being considered for elimination.

With respect to the changes to the scope considered by the Committee in 2000-2002, the following assumptions were considered: (1) Most law graduates who are about to enter into the practice of law in California will do so either as solo practitioners or as employees of small general practice firms; (2) Areas of law such as California civil procedure, California rules of evidence, family law, partnerships and commercial law are areas of significant practice for solo practitioners and employees of small firms; and (3) Testing in those areas is an appropriate exercise of the Committee's public protection responsibilities. Whether these assumptions held true back then was the subject of debate with the law school Deans, and whether they hold true today is yet to be studied by the Committee.

The concerns of the Deans about the impact that any change may have on their curricula and on their students are valid and should be considered. It should be noted, however, that the law schools' role is education and not public protection. On the other hand, the Committee is charged with protecting the legal services consuming public from persons who have not demonstrated a sufficient level of competence on an examination to warrant the issuance of an unlimited license to practice law.

While certainly the designated subjects tested on the CBX are integral in determining whether applicants have the minimum competence required for admission to practice law in California, the primary reason for using the essay question format of assessment is to allow applicants to show their abilities to reason, analyze, synthesize and offer evaluations in a lawyer-like manner. As stated in the Committee's bulletin on the CBX:

Each three-hour essay session consists of three essay questions. This part of the examination is designed to measure an applicant's ability to analyze legal issues arising from fact situations. Answers are expected to demonstrate the applicant's ability to analyze the facts of the question, to tell the difference between material facts and immaterial facts, and to discern the points of law and fact upon which the question turns. The answer must show knowledge and understanding of the pertinent

principles and theories of law, their qualifications and limitations, and their relationships to each other. The answer should evidence the applicant's ability to apply the law to the given facts and to reason in a logical, lawyer-like manner from the premises adopted to a sound conclusion. An applicant should not merely show that he/she remembers the legal principles, but should demonstrate his/her proficiency in using and applying them.

A good grade on a particular essay answer does not ensure absolutely that a particular applicant is in "expert" in a particular subject matter. One would be able, however, to assume that, most likely, the applicant studied the subject to at least get a familiarity with the basic principles and concepts.

The number of subjects tested in other states varies. The NCBE's Multistate Essay Examination (MEE), which is administered as part of the Uniform Bar Examination, covers the follow subject matters: Business Associations, Civil Procedure, Conflict of Laws, Constitutional Law, Contracts, Criminal Law and Procedure, Evidence, Family Law, Real Property, Torts, Trusts and Estates, and Uniform Commercial Code, and consists of six, 30-minute questions. As described by the NCBE: "The purpose of the MEE is to test the examinee's ability to (1) identify legal issues raised by a hypothetical factual situation; (2) separate material which is relevant from that which is not; (3) present a reasoned analysis of the relevant issues in a clear, concise, and well-organized composition; and (4) demonstrate an understanding of the fundamental legal principles relevant to the probable solution of the issues raised by the factual situation. The primary distinction between the MEE and the Multistate Bar Examination (MBE) is that the MEE requires the examinee to demonstrate an ability to communicate effectively in writing." The number of subjects tested on other states' bar examinations that do not use the MEE vary from jurisdiction to jurisdiction – some have fewer than California and some have more subjects that are tested.

This item was put on the Committee's agenda for the March 2015 meeting in response to the Committee's discussion of the possibility during the Committee's last meeting. Consideration of the item is consistent with the Examinations Subcommittee's goal this year to "Review bar examination process, including scope, format, grading and UBE, to determine whether changes to current process should be explored." After discussion during the March meeting, the Committee may wish to direct staff to bring back a specific agenda item that proposes that the Committee: 1) take no action with respect to the scope of the CBX; 2) direct Staff to develop a proposal to modify the scope of the CBX; or 3) go in any other direction it deems appropriate in consideration of this matter.